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Nos. 91-261 and 91-274

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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November 12, 1992

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Respondents Associated Builders & Contractors, of Massachusetts/Rhode Island, Inc., *et al*, pursuant to Supreme Court Rule 25.5, hereby file a supplemental brief for the purpose of bringing to the Court's attention a recently enacted Executive Order of the President of the United States, Executive Order No. 12,818, 57 Fed. Reg. 48,713 (1992), which is reproduced in Respondent's Appendix at A4-A7. This Executive Order, though directed only to federal agencies, plainly contradicts one of the central contentions of the Petitioners and the Solicitor General as amicus in this case, *i.e.*, that governmentally imposed

union-only project agreements "further substantial public purposes." *See* Sol. Gen. Brief at 29; Pet. Brief at 36.

Specifically, the Executive Order prohibits federal agencies from imposing union agreements on any private contractor. The Order further prohibits federal agencies from allowing such agreements to be imposed on private contractors performing work on government projects. The explanatory statement accompanying the Executive Order, which is set forth in the Appendix at A1-A3, contains the following expressions of policy which are pertinent to this case:

> The presence of competition from open shop contractors has consistently operated to drive down costs of taxpayer-financed Government construction projects. Logically, increased competition results in reduced costs. Even where the wage rates for union and nonunion workers alike are set by the Davis-Bacon Act, open shop contractors are free from the restrictive work rules and practices imposed by a collective bargaining agreement that hinder productivity and drive up costs. Open shop contractors are able to use unskilled and semiskilled workers for certain tasks, rather than being required to use a higher paid craftsman, and open shop contractors are also able to use skilled workers for a variety of tasks; by contrast, union employees are often prevented by union jurisdictional lines from performing tasks for which they are clearly skilled.
>
> Project agreements that require open shop contractors to adhere to the provisions of a collective bargaining agreement effectively eliminate the competitive advantages noted above.
>
> * * *

Although the extent of the use of discriminatory project agreements is unknown, where they do exist they tend to drive up labor costs substantially.

* * *

The Executive order is consistent with longstanding Federal procurement regulations that seek to preserve maximum competition on public works.

Respectfully submitted,

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APPENDIX

A1

THE WHITE HOUSE

Office of the Press Secretary
(Miami, Florida)

For Immediate Release October 23, 1992

Executive Order to Promote Open Bidding on Federal and Federally Funded Construction Projects

FACT SHEET

The President signed an Executive order today to promote open bidding on Federal construction projects by precluding the use of agreements between Federal contractors and labor organizations that deny opportunities to open shop employers or otherwise discriminate against nonunion workers. The Executive order is expected to reduce significantly costs on Federal construction projects as well as expand employment opportunities, especially for small businesses.

The order targets provisions of project agreements reached between a construction company and a labor organization, with or without agency approval, that discriminate against open shop contractors and their employees in one or more ways. Some agreements explicitly preclude open shop contractors from bidding on subcontracts. Other agreements operate in practice to the same effect by requiring the open shop contractor to agree to, in addition to a wage and benefits package, costly work rules and practices provided for in the collective bargaining agreement or in the project agreement itself. Still other agreements require nonunion workers of open shop contractors to join the union as a condition of working on the job; in violation of worker rights recognized by Supreme Court decisions.

The presence of competition from open shop contractors has consistently operated to drive down costs of taxpayer-financed Government construction projects. Logically, increased competition results in reduced costs. Even where the

wage rates for union and nonunion workers alike are set by the Davis-Bacon Act, open shop contractors are free from the restrictive work rules and practices imposed by a collective bargaining agreement that hinder productivity and drive up costs. Open shop contractors are able to use unskilled and semiskilled workers for certain tasks, rather than being required to use a higher paid craftsman, and open shop contractors are also able to use skilled workers for a variety of tasks; by contrast, union employees are often prevented by union jurisdictional lines from performing tasks for which they are clearly skilled.

Project agreements that require open shop contractors to adhere to the provisions of a collective bargaining agreement effectively eliminate the competitive advantage noted above.

Cost savings on Federal projects are expected to be significant. The Federal FY 1993 budget for construction includes nearly $21 billion in direct Federal programs and over $29 billion in Federal grants. Although the extent of the use of discriminatory project agreements is unknown, where they do exist they tend to drive up labor costs substantially. A 1991 GAO study of a project agreement for the construction of a Department of Energy facility fount that average wage rate on the project exceeded the average Davis-Bacon wage rate by an additional 21 percent. Other recent studies report even greater labor cost differentials.

Nothing in the Executive order prevents contractors or their employees from voluntarily seeking union representation nor should the Executive order be read to discourage union contractors in any way from bidding on Federal projects. The Executive order merely prohibits any agency, contractor or construction manager from imposing a union-only requirement on any other contractor or subcontractor seeking to perform Federal work. The Executive order is consistent with longstanding Federal procurement regulations that seek to preserve maximum competition on public works. Accordingly, the Executive order

directs executive agencies not to award a contract for the construction of a Federal project unless it ensures that the contractor will not impose any discriminatory provision on any subcontractor as a condition of the award of the subcontract.

The Executive order also directs executive agencies to examine their grant-making authority within 30 days and to exercise any such authority to condition the award of a Federal grant for construction on the grantee's agreement to comply with the nondiscrimination provisions of the Executive order.

The order is effective in 30 days.

THE WHITE HOUSE

Office of the Press Secretary
(Miami, Florida)

For Immediate Release October 23, 1992

EXECUTIVE ORDER

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OPEN BIDDING ON FEDERAL AND FEDERALLY FUNDED CONSTRUCTION PROJECTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, in order to (1) promote and ensure open bidding on Federal and federally funded construction projects; (2) increase competition in Federal construction contracts and contracts under Federal grants or cooperative agreements; (3) reduce construction costs; (4) expand job opportunities, especially for small businesses; and (5) uphold the associational rights of workers freely to select, or refrain from selecting, bargaining representatives and to decide whether or not to be union members, so as to provide access to employment opportunities on Federal and federally funded construction projects for all workers; thereby promoting the economical and efficient administration and completion of Federal and federally funded construction projects, it is hereby ordered as follows:

Section 1. (a) To the extent permitted by law, before any executive agency may award any construction contract after the effective date of this order, or obligate funds pursuant to such contract, it shall ensure that neither the agency's bid specifications, project agreements, nor other controlling documents, nor those of any contractor or construction manager, shall:

(1) Require bidders, offerors, contractors or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(2) Otherwise discriminate against bidders, offerors, contractors or subcontractors for refusing to become or remain signatories or otherwise adhere to agreements with one or more labor organizations, on the same or other related construction project(s), or

(3) Require any bidder, offeror, contractor or subcontractor to enter into, adhere to, or enforce any agreement that requires its employees, as a condition of employment, to:

(i) become members of or affiliated with a labor organization; or

(ii) pay dues or fees to a labor organization, over an employee's objection, in excess of the employee's share of labor organization costs relating to collective bargaining, contract administration, or grievance adjustment.

(b) No contractor, and no subcontractor under a Federal contract, shall require, as a condition of any subcontract relating to a Government construction contract, that the party with which it contracts impose or enforce any of the elements specified in section 1(a) (1)-(3) above in performing its subcontract. This section does not prohibit a contractor or subcontractor from voluntarily entering into an otherwise lawful agreement with a labor organization regarding its own employees.

(c) Contracts awarded before the effective date of this order, and subcontracts awarded pursuant to such contracts, whenever awarded, shall not be governed by this order.

Sec. 2. (a) The heads of executive agencies shall, within 30 days of the date of issuance of this order, review all statutes

under their jurisdiction that provide authority to issue grants or enter into cooperative agreements for construction projects and identify any statute that provides authority to condition a grant award or cooperative agreement on the recipient's or party's agreement that neither bid specifications, project agreements, nor other controlling documents pertaining to the grant or cooperative agreement contain any of the elements specified in section 1(a) (1)-(3), above.

(b) The heads of executive agencies shall exercise any authority identified pursuant to section 2(a), to the extent consistent with law, so as to preclude the grant recipient or party to a cooperative agreement from imposing any of the elements specified in section 1(a) (1)-(3) above in connection with any such grant or cooperative agreement, awarded or entered into after the date of such exercise.

Sec. 3. (a) In the event that a Federal contractor or construction manager does not perform in accordance with section 1 above, the executive agency shall take such action as may be appropriate, as determined by the agency, consistent with law or regulation, including, but not limited to, debarment, suspension, termination for default, or withholding of payments.

(b) In the event that a recipient of a Federal grant or party to a cooperative agreement does not perform in accordance with section 2(b) above, the executive agency that awarded the grant shall take such action, as determined by the agency, consistent with law or regulation, as may be appropriate.

Sec. 4. (a) The head of an executive agency may exempt a particular project, contract, subcontract, grant, or cooperative agreement from the requirements of any or all of the provisions of sections 1 and 2 of this order, if the agency head finds that special circumstances require an exemption in order to avert an imminent threat to public health or safety or to serve the national security.

(b) A finding of "special circumstances" under section 4(a) may not be based on the possibility of, or an actual labor dispute concerning the use of:

(1) contractors or subcontractors who are non-signatories to, or otherwise do not adhere to, agreements with one or more labor organizations, or

(2) employees on the project who are not members of or affiliated with a labor organization.

Sec. 5. (a) "Construction contract" as used in this order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) "Executive agency" as used in this order shall have the same meaning it has in 5 U.S.C. 105.

(c) "Labor organization" as used in this order shall have the same meaning it has in 42 U.S.C. 2000e(d).

Sec. 6. Within 30 days of the issuance of this order, the Federal Acquisition Regulatory Council shall take whatever action is required to amend the Federal Acquisition Regulation in order to implement the provisions of this order.

Sec. 7. This order is not intended to create any right or benefit, substantive or procedural, enforceable by a nonfederal party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 8. This order shall become effective 30 days after the date of this order.

GEORGE BUSH

THE WHITE HOUSE,
October 23, 1992.